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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 272

ARTHUR TERMINIELLO,

Petitioner,

vs.

CITY OF CHICAGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF ILLINOIS. THERE HEARD ON APPEAL FROM APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, ON APPEAL FROM MUNICIPAL COURT OF CHICAGO.

HONORABLE JOHN V. MCCORMICK, JUDGE PRESIDING.

PROSECUTION FOR VIOLATION OF DISORDERLY CONDUCT ORDINANCE.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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MAY IT PLEASE THE COURT:

The respondent, City of Chicago, opposes the petition for certiorari on the following grounds:

A jury in the Municipal Court of Chicago found the petitioner guilty of the offense of disorderly conduct, in violation of a city ordinance. The Appellate Court of Illinois, First District, reviewed the evidence in detail and affirmed the judgment. (332 Ill. App. 17.) The Supreme Court of Illinois affirmed the judgment of the Appellate Court (Tr. 14.) (400 Ill. 23).

It is the contention of the petitioner that the judgment against him violates his right of free speech and free assembly under the First and Fourteenth Amendments to the Constitution of the United States and under the fourth paragraph of Article II of the Constitution of the State of Illinois. His claim as to the Constitution of the State of Illinois has been disposed of by the judgment of the Supreme Court of Illinois, (400 Ill. 23). The only question before this court is whether his rights under the First and Fourteenth Amendments of the Constitution of the United States have been infringed. It is respectfully submitted that they have not been infringed and that the petition for writ of certiorari should be denied.

I.

THE CONSTITUTIONAL GUARANTEE OF FREE SPEECH DOES NOT PREVENT THE PUNISHMENT FOR LIBELOUS, ABUSIVE AND OFFENSIVE UTTERANCES WHICH HAVE A TENDENCY TO BREACH THE PEACE.

Inherently the petitioner's misplaced reliance upon the constitutional provisions guaranteeing the right to freedom of speech proceeds (1) upon the misapprehension that libelous utterances are sheltered by the guarantee of free speech, (2) upon the failure to recognize that the words "scum" and "slimy scum" are insulting or "fighting" words and (3) upon the inability to appreciate the distinction between "previous restraint" as that concept is defined by the United States Supreme Court and subsequent punishment for a past abuse of the right of free speech. An analysis of the cases relied upon by petitioner will disclose that they completely and emphatically support the judgment in this case.

The key to the problem is succinctly contained in Section 4 of Article II of the Illinois Constitution:

> "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

The significance of the foregoing provision completely escapes petitioner. While it is true that it is a legal impossibility to restrain in advance any utterance, no matter how vicious and reprehensible it may be, a person cannot escape *responsibility and punishment* for utterances which the state has the power to prohibit and punish in the interests of a well ordered society. It is well settled and it is conceded by petitioner that the right of free speech is not absolute and that it must give way in certain instances to the paramount right of society to protect itself from utterances that disturb its peace and tranquility. The issue in this case is whether the petitioner has transgressed the bounds of permissible speech. The Supreme Court of Illinois, the Appellate Court and a jury have held that he has. The only other question to consider is whether the authorities relied on by petitioner hold that the constitution offers him immunity from punishment. It is abundantly clear that they do not.

On page 21 of the petition is cited *Stromberg v. California*, 283 U. S. 359, where, at page 368, the court said:

> "There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime * * *."

The assertion is made (Br. 27) that there is nothing in petitioner's utterances which incite to violence and crime and that there was nothing personal in anything he said (p. 61.) His assertion overlooks the steady stream of slander that he poured indiscriminately upon so many of-

jects of his venom and the words "scum" and "slimy scum" which stand judicially established as words of strong opprobrium and as violence-inciting language. He overlooks in particular the wild tales of alleged mayhem which actually provoked his audience to cries advocating murder, mayhem and sterilization of the objects of his defamatory statements.

Even the dissenting opinion in the Appellate Court, upon which petitioner relies so heavily, states as follows (Tr. 26):

> "The terms 'scum,' 'slimy scum,' and 'skunk's of Jews' are epithets, abusive and insulting terms. They are not in any proper sense communication of information or opinion safeguarded by the constitution."

The decision in *Near* v. *Minnesota*, 283 U. S. 697 (discussed by petitioner on page 30 of his petition), is simply not understood by him. In that case an injunction was sought, pursuant to statute, to restrain a newspaper from publishing malicious, scandalous or defamatory matter. The court reiterated that (page 708):

> "Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse."

But the court pointed out (page 711):

> "The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical."

The further effect of the statute is thus described (page 712):

> "The statute not only operates to suppress the offending newspaper or periodical but to put the publisher under an effective censorship. When a newspaper or periodical is found to be 'malicious, scandalous and defamatory,' and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment."

Near v. *Minnesota* presents the clearest possible kind of previous restraint. The case at bar on the contrary presents an attempt to punish in the ordinary sense for past utterances and no attempt is made to restrain, by injunction or otherwise, future utterances of the defendant. Should they, when actually made, be contrary to the public peace, they may then be punished after due conviction by the regular judicial process. This prospect may and should act as a deterrent, but that is not regarded as a previous restraint in the sense defined by *Near* v. *Minnesota*. The petitioner's suggestion that it constitutes a previous restraint because it will restrain him from future like offenses is ludicrous. That is the very purpose of libel laws—to deter. Because previous restraint is not permissible, punishment after the fact is provided with a view to *deter the offenders and others* from like practices. It is the universally accepted justification for punishment of crime of every sort.

The petitioner can derive no comfort from *Thornhill* v. *Alabama*, 310 U. S. 88, where the court invalidated a state act which prohibited *all* picketing. The court held the statute was too broad because (page 104):

> "The range of activities proscribed by Sec. 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected may enlighten the public on the nature and causes of a labor dispute."

The court in the case just cited affirms the power of the state to prohibit acts which tend to breach the public peace. (Page 105.) The ordinance herein involved is narrowly framed to prohibit not all acts and utterances but only such acts and utterances as tend to a breach of the peace. The facts in the case at bar call only for a narrow construction that libelous and personally abusive epithets are

prohibited because they clearly tend to breach the public peace. Petitioner expresses alarm (Br., p. 24) over a "perverted, illegal" use of the ordinance as a threat to the two party system. We cannot believe that the two party system rests upon such tenuous ground as the asserted right to slander persons and groups and to engage in wanton, abusive, insulting epithets and fantastic tales that whip audiences into such frenzy that they demand the murder, crippling and sterilization of the objects of the speaker's slanderous utterances. Counsel for petitioner do not seem to realize that even in the political arena, defamation of a candidate is punishable by the State. (*Ogren* v. *Rockford Star Printing Co.*, 288 Ill. 405, 417.)

Murdock v. *Pennsylvania*, 319 U. S. 105, discussed by petitioner on pages 27-29 of his petition, is clearly distinguishable from the case at bar. In that case the issue of previous restraint was involved. The ordinance under attack imposed a license fee upon canvassing and soliciting. The ordinance was construed to embrace the activities of the religious sect, Jehovah's Witnesses. The court held that the state authorities were powerless to require a license as a prerequisite to the exercise of the privilege of freedom of speech and religion. But the court significantly observed (p. 116):

> "Jehovah's Witnesses are not 'above the law.' But the present ordinance is not directed to the problems with which the police power of the state is free to deal. It does not cover; and petitioners are not charged with, breaches of the peace. They are pursuing their solicitations peacefully and quietly. Petitioners, moreover, are not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation."

The applicability of the foregoing quotation to the case at bar and its support for the ordinance involved and the

charge of its violation are clear. The petitioner protests that the city seeks to impute to his utterances abusive and objectionable matter it does not contain. Reasonable minds cannot possibly disagree that the utterances complained of were abusive and objectionable in the extreme. The jury found it to be so, and the Appellate Court has, by affirming the judgment, rendered their finding conclusive. The threat to public peace was clear as evidenced by the reactions of the audience. The petitioner quibbles about the statement "non-Christian doctors" and "non-Christian nurses" as possibly not meaning Jews. When the defendant was speaking of "non-Christians" "all of one race" (Tr. 74) who were in the armed forces of the country no one could doubt whom he intended to accuse. Considering the tenor of his speech there is no question that he meant Jews. He himself said, "I meant the Jews and others". (Tr. 117.) His assertion that "others" meant "Mohamtnedans" in the armed forces of our country is, of course, ridiculous. (Tr. 118.)

Thomas v. Collins, 323 U. S. 516, like *Near v. Minnesota*, and *Murdock v. Pennsylvania*, involved a question of previous restraint inherent in a state statute that required labor organizers to apply for an organizer's card. For the first time, after reading this decision, the defendant seems to have acquired a measure of understanding of the concept of "previous restraint" because he states, (page 34 of his petition): "There was of course no 'previous restraint' so far as appellant's speech of February 7, 1946, was concerned * * *." The constitution is thus satisfied because it does not concern itself with the deterrent effect of prospective punishment for acts or utterances violating state law operating within its legitimate sphere guarding the public peace. The constitution is content to let

the courts and juries determine whether punishment should be meted out *after* the acts have been committed or the utterances expressed.

The remaining case cited by petitioner (Tr. 34), *Cantwell* v. *Connecticut*, 310 U. S. 296, involving charges that the defendant breached the peace, touches most closely upon the issues in the present case. A thorough understanding of the reasons which led the court to hold the petitioner guilty will impel the affirmance of the judgment in this case.

In the *Cantwell* case, 310 U. S. 296, the court summarizes the law relating to breaches of the peace and defines the power of the state to prevent them (p. 308):

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but *acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect.*" (Italics ours.)

The court pointed out that Cantwell was conducting himself in a peaceful manner. "There is no showing that his deportment was noisy, truculent, overbearing or offensive. He requested of two pedestrians permission to play to them a phonograph record. The permission was granted. *It is not claimed that he intended to insult or affront the hearers by playing the record.* It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic." (Pages 308-9—Italics ours.)

In the case at bar, the petitioner intended to and did defame many absent persons as well as groups of persons embracing members of his audience and deliberately insulted some of his hearers by calling them "scum" and "slimy scum." In fact his only regret seemed to be that his vocabulary did not at the moment provide him with more offensive words with which to express his contempt. (Tr. 68.)

That the court in the *Cantwell* case would regard the utterances of the petitioner herein as punishable is clear from the following (page 309):

> "Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent *or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.*" (Italics ours.)

And finally the right of the State to punish utterances tending to breach the peace is made crystal clear by the court (page 310):

> "There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish."

The foregoing language is so appropriate to the case at bar that the court might well have been characterizing the utterances of the petitioner herein. The manifest purpose of his words assuredly originated in the "delusion of racial or religious conceit" and they clearly were such as to "incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties."

The petitioner relies upon the language of the court that "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question." In view of the entire opinion the petitioner's hope that this language gives him immunity is forlorn. The court manifestly recognized the right of the State to punish the common law offense of breach of the peace *as that offense has been traditionally understood*. With regard to verbal acts the common law offense means libelous, obscene or profane words or abusive epithets. If the State intends to go beyond the traditional definition and bring other acts within its scope, such as playing phonographs on the public streets, then it can do so only by means of a statute narrowly drawn to define and punish specific acts. There is no necessity for, and the court clearly cannot have intended to say and did not say that a narrowly drawn statute must be present to punish those who resort to libel and epithets. Their punishment even in the absence of statute has been recognized for too long a time to admit of any doubt on that score.

Our interpretation of this portion of the opinion is thoroughly justified by the later case of *Chaplinsky v. New Hampshire*, 315 U. S. 568, wherein the court said (571):

> "There are certain *well-defined* and *narrowly limited* classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, *the libelous, and the insulting or 'fighting' words*—those which by their very utterances inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Italics ours.)

It should be noted that the statute in the *Chaplinsky* case was couched in broad language (315 U. S. 569). It prohibited any person from addressing "any offensive, derisive or annoying word" to any other person in a public place. The state court narrowly construed the statute as being designed to preserve the public peace and therefore no words were "forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." (315 U. S. 573.)

The state court further interpreted the statute (315 U. S. 573):

> "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. The English language has a number of words and expressions which by general consent are 'fighting words' when said, without a disarming smile. Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. The statute as construed, does no more than prohibit the face-to-face words plainly likely to

cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

The ordinance should be construed in a way that will render it free from constitutional objection. The ordinance in question was construed in *City of Chicago* v. *Hunt*, 374 Ill. 234. In answer to the charge that it was indefinite and uncertain this court held that a legislative body may use words having a common law meaning. When the city council used the words "breach of the peace" those words must be understood in the light of the common law. So far as verbal acts are concerned the ordinance has in mind and prohibits (in the language of the Supreme Court of the United States) "well-defined and narrowly limited classes of speech, the prevention and the punishment of which have never been thought to raise any Constitutional problem" "the lewd and obscene, the profane, the *libelous, and the insulting or fighting words.*" (315 U. S. 571-2.) (Italics ours.)

Thus construed, and that is the construction we urge, there can be no constitutional objection to the ordinance. Nor can there be any doubt concerning its violation by the petitioner.

Petitioner apparently fails to see any libelous, insulting or fighting words in the speech. We venture to say that the average person would not share this placid reaction to "scum" and "slimy scum." Those words rank high in the list of "classical fighting words." Nor would the average person share with him the naive view that his talk was not slanderous when it overflowed with charges of sedition, official corruption, lack of judicial integrity and a multi-

tude of other offenses climaxed by an accusation of crimes as hideous as the mind of man could conceive—amputation of limbs and injection of syphilis and other disease germs.

The ordinary prosecution for disorderly conduct relates to acts or utterances originating in spontaneous loss of temper or the use of opprobrious language by persons who have little education or breeding and know no better. The tranquility of the public is disturbed for the moment and tranquility reigns again. This case does not present the ordinary situation. This breach of the peace is set in a background of deliberate hate and malice spread by one who has so conducted himself that the Church which once offered him the loftiest of offices—a priesthood—was forced to suspend him. (Tr. 115.) His utterances have been described by his own counsel as "disjointed and disconnected" but "nevertheless, the exposition of ideas is there." If there be any exposition of ideas, it is composed of a theme of hate and fear. These disconnected and disjointed utterances had only one deliberate purpose—to excite the audience to an uncontrollable fever of emotion by pumping them full of hatred and fear. The tranquility is disturbed not only for the moment but the hatred and fear take root and grow long after the incident is over.

The petitioner started with invective against certain members of the audience (Tr. 68). He expressed fear that freedom of speech was being undermined (Tr. 68). He talked about intimidation (Tr. 68). He spoke about impending destruction of America by revolution. He preached hatred of Russia, charging murder of fifteen million people (Tr. 70). He preached hatred of the New Deal, implying it fostered Communism (Tr. 70). He charged Mrs. Roosevelt with being a Communist (Tr. 71). He maligned the motives of Henry A. Wallace in trying to provide jobs (Tr. 71). He urged mistrust of Chief

Justice Stone (Tr. 71). He charged a conspiracy to pervert the F. B. I. (Tr. 71). He charged Washington officials with bribing South American officials (Tr. 72). He charged Morganthau with a plan to starve babies and pregnant women in Germany (Tr. 73). He charged certain non-Christian doctors and nurses, "all of one race", with mayhem and injection of syphilis and disease germs (Tr. 74). He preached contempt for England (Tr. 75). He preached hatred of the Jews (Tr. 75-77). He instilled fear of vaguely defined enemies (Tr. 77). He instilled fear of the Jews (Tr. 79).

It is impossible to conceive of utterances more calculated to disturb the public peace and tranquility. Utterances such as these set the stage for and resulted in the extermination of millions of persons in Europe. The favorite device of aggressor countries was the pretext that they were in danger of persecution and hence were required to take drastic action in self-protection.

We have already shown that the petitioner stepped beyond the bounds of permissible speech in a number of instances. In view of the background against which these transgressions of free speech occurred, there is small wonder that the jury found him guilty, and that the Appellate Court and the Illinois Supreme Court affirmed the judgment.

The Appellate Court did more than merely affirm the verdict of the jury and the judgment of the court. It affirmed in such ringing terms that persons like the petitioner who seem unable to distinguish between what is offensive and libelous and what is innocent are given clearly to understand the limits of constitutionally guaranteed speech. The opinion of the court makes it clear that free speech does not mean loose talk. Defamatory and abusive utterances have no place in the orderly exposition of ideas.

While it is true that persons are guaranteed the right to express thoughts which may be unpopular, they do not have the right to express themselves in language which is inherently offensive or defamatory. This mode of expression should be condemned in emphatic terms so that the peace and good order of the City of Chicago and the State at large will be permanently protected. This case calls for a reaffirmation of the vigorous language of this court in *Cantwell* v. *Connecticut*, 310 U. S. 296, where this court said:

> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot . . ."

Conclusion.

This case presents no constitutional question. The Appellate Court of Illinois (332 Ill. App. 17) and the Supreme Court of Illinois (396 Ill. 41, 400 Ill. 23) have specifically held that the question of free speech is not involved here. The only question in this case is the factual question of whether the petitioner was guilty of a violation of the ordinance punishing as disorderly conduct one who makes or aids in making an improper noise or diversion tending to a breach of the peace. This factual question has been settled by the verdict of a jury and the affirmance by the Appellate Court of Illinois and the Supreme Court of Illinois.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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